ST. JOHN'S UNIVERSITY SCHOOL OF LAW

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2017 Volume X No. 9

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Cite as: *Banks that Collect Debt on their Own Account are not Debt Collectors under the FDCPA,* 10 ST. JOHN'S BANKR. RESEARCH LIBR. NO. 9 (2017).

Introduction

The Fair Debt Collection Practices Act (the "FDCPA") was enacted in 1977 to stop debt collectors from engaging in unfair and deceptive practices when collecting consumer debts.[1] The FDCPA was enacted as a response to an abundance of evidence of the use of abusive and deceptive practices by many debt collectors.[2] Collection abuse took many different methods such as threats of violence, telephone calls at unreasonable hours, impersonation, misrepresentation of debts, and collection of information under false pretenses.[3] These unfair practices contributed to household bankruptcies, marital instability, loss of jobs, and invasions of individual privacy.[4]

The FDCPA imposes three requirements on debt collectors.[5]First, debt collectors must identify themselves as a debt collector when speaking to a debtor.[6] Second, debt collectors must advise the debtor of their right to verify and dispute the debt.[7] Lastly, debt collectors must refrain from harassment, false representations, and third-party communications.[8]

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[1] Consumer Credit Protection Act, S.Rep. No. 95-382, at 1-2 (1977).
[2] 15 U.S.C § 1692(a) (2012).
[3] Consumer Credit Protection Act, S.Rep. No. 95-382 at 2.
[4] 15 U.S.C § 1692(a).
[5] 15 U.S.C. § 1692b.
[6] *Id.* at § 1692b(1).
[7] *Id.* at § 1692b(2).
[8] *Id.* at § 1692b(3).

It is undisputed that a third-party debt collection agent would generally qualify as a debt collector under section1692a. Lenders that attempt to collect loans they originated, however, would generally not be a debt collector under the FDCPA. The Supreme Court in *Henson v. Santander Consumer USA Inc.* addressed an area in dispute -- how to classify an individual or entity that regularly purchases debts originated by someone else and then seeks to collect those debts for its own account. The Supreme Court rendered a unanimous decision, the first written by Justice Neil Gorsuch, which held an individual or an entity that regularly purchases debt originated by someone else and then seeks to collect that debt for its own account is not a debt collector under the FDCPA.[9]

This memorandum discusses how to determine if an individual or entity qualifies as a debt collector under the FDCPA. Part I analyzes the Circuit split on the issue, which led to the Supreme Court granting certiorari. Part II addresses how the Supreme Court ultimately resolved the split and how the Court reached its decision of who qualifies as a debt collector in *Henson v. Santander Consumer USA Inc*.

I. The Circuit Courts had different interpretations of the term "debt collector" under the FDCPA.

A "debt collector" is one that attempts to collect debts "owed or due another."[10] A "creditor" is one that "offers or extends to offer credit creating a debt or to whom a debt is owed."[11] A violation of the FDCPA triggers civil liability and consumers can sue for actual damages, statutory damages and attorney's fees and costs.[12] Therefore, whether entities qualify as a debt collector or not has serious financial implications.

[9] *See* Henson v. Santander USA Inc., 137 S.Ct. 1718 (2017).
[10] 15 U.S.C. § 1692a(6).
[11] 15 U.S.C. § 1692a(4).
[12] 15 U.S.C. § 1692k.

A. *The Third and Seventh Circuits held that an entity that regularly purchases debt originated by someone else and then attempts to collect that debt for its own account is a debt collector under the FDCPA*

In *F.T.C. v. Check Investors, Inc.*, the Third Circuit addressed an appeal from a dispute arising out of the purchase of a debt.[13] Check Investors, Inc., an investment company, purchased large amounts of insufficient funds checks from Telecheck, a consumer reporting agency.[14] When checks were dishonored, Telecheck paid the merchant the face value of the check, and in exchange the merchant assigned all rights to Telecheck, which then attempted to collect on the debt.[15] If Telecheck's efforts to collect the debt failed, it had the option to assign all the rights it acquired from the original merchant to Check Investors.[16] Check Investors would thereafter attempt to collect the debt.[17] Check Investors routinely added a fee to the face amount of each check and it engaged in deceptive and aggressive techniques such as threatening consumers with criminal or civil prosecution, contacting family members, and sending letters with abusive language.[18] Check Investors' tactics often worked as it netted $10.2 million from more than 42,000 consumers between 2000 and 2003.[19]

A group of consumers sued Check Investors for violating the FDCPA and the district court held that Check Investors was a debt collector under the FDCPA.[20] On appeal before the Third circuit, Check Investors argued that it was not a debt collector because it was not the originator of the debt.[21] Instead, it regularly purchased debts originated by someone else and then collected

[13] *See* 502 F.3d 159 (3d Cir. 2007).
[14] *Id.* at 62.
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.* at 163.
[19] *Id.*
[20] *Id.* at 165.
[21] *Id.*

those debts for its own account.[22] The Third Circuit affirmed the district court's decision and held that Check Investors qualified as a debt collector under the FDCPA.[23]

The parties conceded that at first glance Check Investors looked like a creditor.[24] However, an entity cannot be both a creditor and a debt collector.[25] In determining if Check Investors was a debt collector or a creditor, the court focused on when the debt was acquired.[26] If the debt acquired was in default, there was no ongoing relationship, and the entity was a debt collector because the sole purpose was collection.[27] If the loan was current when it was acquired, there was an ongoing relationship, which was effectively the same as that between the original owner and debtor.[28] The court held that Check Investors acquired the defaulted debts solely for collection purposes and had no intention of having an ongoing relationship. [29] Therefore, it was a debt collector.[30]

Similarly, the Court of Appeals for the Seventh Circuit held that a purchaser of debt was a debt collector subject to the FDCPA in M*cKinney v. Cadleway Properties, Inc*., 548 F.3d 496, 498 (7th Cir. 2008).[31]There, McKinney obtained a disaster assistance loan from the Small Business Administration (the "SBA") after her home was damaged by a flood.[32] McKinney defaulted on the loan and SBA sold the loan to Lehman Capital/Aurora, which then sold it to Caldeway, a loan servicing company.[33] Caldeway sent McKinney a collection letter, which

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[22] *Id.*
[23] *Id.*
[24] *See Check Investors, Inc.*, 502 F.3d 159 at 173.
[25] *Id.*
[26] *Id.* at 174.
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *See* McKinney v. Cadleway Properties, Inc., 548 F.3d 496, 498 (7th Cir. 2008).
[32] *Id.*
[33] *Id.* at 498-99.

included a validation of debt notice and information regarding her right to challenge the debt. [34] McKinney sued Caldeway and alleged the language of the validation notice that violated the FDCPA and that an unsophisticated consumer would be confused about the right to dispute the debt.[35]

The district court ruled that Caldeway was a "debt collector" because Caldeway had acquired a debt and attempted to collect on it.[36] On appeal, the Seventh Circuit agreed.[37] The court looked to the statutory definitions of "debt collector" and "creditor" under section 1692a and found that the two terms were mutually exclusive.[38] The definition of creditor under section 1692a(4) excludes an entity that attempts to collect "a debt in default" while the definition of debt collector under section1692a(6)(F) excludes an entity that attempts to collect "a debt which was not in default at the time it was obtained".[39] Although the FDCPA does not define default, the court concluded McKinney's debt had been delinquent for at least two years when Cadleway purchased it, and that was sufficient to be in default for purposes of the FDCPA.[40] Therefore, Caldeway would be a debt collector if it acquired the debt at the time of default.

B. The Fourth Circuit held that an entity that regularly purchases debt originated by someone else and then seeks to collect that debt for its own account is not a debt collector under the FDCPA.

In *Henson v. Santander Consumer USA Inc.*, the Fourth Circuit addressed a lawsuit involving four individuals who purchased a car with money borrowed from CitiFinancial Auto ("CitiFinancial").[41] Following the individuals' default on the loans, CitiFinancial sold the loans

[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.* at 501.
[38] *Id.*
[39] *See* 15 U.S.C § 1692a(4); *see also* 15 U.S.C. §1692a(6)(F).
[40] *See* Cadleway Properties, Inc., 548 F.3d at 502.
[41] *See* Henson v. Santander Consumer USA, Inc., 817 F.3d 131, 133 (4th Cir. 2016).

to Santander Consumer USA Inc., a consumer finance company.[42] Santander thereafter contacted the individuals to collect the debt.[43] The individuals sued Santander for unfair and deceptive practices and alleged Santander misrepresented the amount of the debt and their entitlement to collect.[44] In response, Santander argued that the individuals did not demonstrate that Santander was a debt collector under the FDCPA, which was necessary to trigger liability.[45]

The district court granted Santander's motion to dismiss because the complaint did not allege sufficient facts to show that Santander was a "debt collector" under the FDCPA.[46] Moreover, the court concluded Santander was collecting the debt on its own behalf and the FDCPA does not generally regulate an entity collecting a debt owed to itself.[47] On appeal, Santander argued it was not a debt collector because an entity that regularly purchase debts originated by someone else and then seek to collect those debts for its own account is not a debt collector.[48] The Fourth Circuit affirmed the district court ruling and held Santander was collecting the debt on its own behalf.[49] Therefore, Santander was not a debt collector under the FDCPA.[50]

Plaintiffs used the same arguments made in *Check Investors* and *McKinney*. According to Plaintiffs, "debt collector" and "creditor" are mutually exclusive under the FDCPA.[51] Further, according to Plaintiffs, the determining factor of whether an entity is a "debt collector" or "creditor" is whether the debt was acquired prior to default or after default.[52] However, the

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[42] *Id.* at 134.
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *Id.* at 135.
[52] *Id.*

Fourth Circuit disagreed and stated the plaintiffs' interpretation contradicted the plain language of the FDCPA.[53] Default status had no bearing on the analysis.[54] The analysis was focused on whether an entity was collecting a debt for its own account or for another.[55]A debt collector regularly collects for others while a creditor collects for itself.[56] The complaint specifically alleged that Santander was collecting debts owed to itself.[57] Therefore, it was a creditor and not a debt collector under the FDCPA.[58]

II. The Supreme Court resolves the Circuit Split.

In *Henson v. Santander Consumer USA Inc*., the Supreme Court resolved the circuit split by holding that an individual or entity that regularly purchases debt originated by someone else and then seeks to collect that debt for its own account is not a debt collector under the FDCPA. The Court used numerous tools to interpret the meaning of "debt collector." First, the Court analyzed the plain language of the statute. Second, the Court discussed proper grammar techniques and dictionary definitions. Third, the Court considered the FDCPA as a whole.

A. The Court's statutory analysis of the term "debt collector" under Section 1692a(6) of the FDCPA.

Section 1692a(6) of the FDCPA defines debt collector as anyone that "regularly collects or attempts to collect ... debts owed or due ... another."[59] The plain language of section 1692a(6) suggests that the words "owed or due…another" encompasses third party collection agents, not a debt owner seeking debts on its own accord.[60] Section 1692a(6) does not focus on how a debt

[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.* at 137.
[57] *Id.* at 138.
[58] *Id.*
[59] 15 U.S.C. § 1692a(6).
[60] *See Santander,* 137 S. Ct. at 1721.

owner came to be a debt owner. [61]Instead, it focuses on whether the debt owner is collecting debts for its own accord or for another.[62] Therefore, following the Court's statutory analysis in *Henson v. Santander Consumer USA Inc.*, it logically follows that Santander was collecting debts for its own accord, not for another.[63] The Court explicitly stated it was hard to disagree with the Fourth Circuit's statutory explanation.[64]

B. The Court analyzed grammar to explain the plain language of Section 1692a(6).

Petitioners argued that the plain language of section 1692a(6) overlooked an important analysis of tense.[65] Petitioners argued that the word "owed" is a past participle of the word owe, which means the statute covers anyone that regularly seeks to collect debts previously owed another, including Santander.[66] The petitioners stressed that it included any debts in the past.[67] The Court stated the petitioners' argument was not grammatically sound.[68] The word owed is a past participle, but past participles are frequently used to describe the present state of a noun.[69] The Court cited the definition of past participle from the Cambridge Guide to English usage, which stated that a past participle is a misnomer since it can describe a present tense.[70] Further, the Court gave concrete examples of past participle phrases that have present meaning such as "*burnt* toast is inedible, a *fallen* branch blocks the path, and (equally) a debt *owed* to a current owner may be collected by him or her."[71] The Court's structurally sound grammatical analysis

[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *See Santander,* 137 S. Ct. at 1722.
[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.*

forced the petitioners to concede that past participles can be used to describe the present state of a noun.[72]

The petitioners further attacked the statutory phrase of "owed or due… another" and argued that the word "due" describes a debt that is currently due and not one that was due in the past.[73] To accept petitioners' argument would mean Congress would have meant section 1692a(6) to have two words in the same phrase read in different tense.[74] Petitioners argument would force the Court to read the phrase as "debts that *were* owed or *are* due another". [75] Congress gave no indication it wanted the Court to read the phrase this way.[76]

C. Identical words used in different parts of the same statute carry the same meaning unless Congress states otherwise.

The Court analyzed other provisions of the FDCPA that included the word "owed," to provide petitioners a better perspective of its statutory analysis.[77] Congress routinely used the word "owed" throughout the statute to refer to present debts, not past ones.[78] For example, section 1692a(4) defines a creditor as "any person who offers or extends credit creating a debt or to whom a debt is owed…"[79] Further, section 1692g(a)(2), sets forth the notice of debt requirements, states that the debt collector must send a written notice containing "the name of the creditor to whom the debt is owed".[80] Both of these subsections indicate Congress meant the word "owed" to refer to present debt relationships.[81] Petitioners did not offer a persuasive reason

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[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *See Santander,* 137 S. Ct. at 1722.
[78] *Id.* at 1722-23.
[79] 15 U.S.C. § 1692a(4).
[80] 15 U.S.C. § 1692g(a)(2).
[81] *See Santander,* 137 S. Ct. at 1722.

why "owed" should be read differently under section 1692a(6).[82] The Court previously determined that identical words used in different parts of the statute are interpreted to carry the same meaning.[83]

Further, Congress explicitly states when the definitions of words have different meanings. Under section 1692a(4), Congress defines a loan originator as someone that "offers or extends credit creating a debt to whom a debt is owed" and a debt purchaser as someone "to whom a debt is owed".[84] Petitioners suggested that loan originators and debt purchasers also have a different meaning under section 1692a(6), but the statutory text does not distinguish them.[85] Instead, the statutory text focuses on whether the defendant seeks to collect on behalf of itself or another.[86]The Court previously determined that in interpreting statutes, differences in languages mean differences in meaning.[87]

Conclusion

The Supreme Court's decision in *Henson v. Santander Consumer USA Inc.* resolved a longstanding debate of whether an individual or an entity that regularly purchases debt originated by someone else and then seeks to collect that debt for its own account qualifies as a debt collector under the FDCPA. The Circuit Courts had different interpretations of the term "debt collector" under section 1692a(6). There was much debate over the plain reading of the statute and Congress' intent in enacting the FDCPA. Ultimately, the Supreme Court ruled that regardless of the overarching policy and intent of the FDCPA, it could not overrule the plain meaning of the statute. However, the Court's ruling was not a clear win for financial entities

[82] *Id.* at 1723.
[83] *See* IBP, Inc. v. Alvarez, 546 U.S. 21, 34 (2005).
[84] 15 U.S.C. § 1692a(4).
[85] *See Santander*, 137 S. Ct. at 1723.
[86] *Id.*
[87] *See* Loughrin v. United States, 134 S. Ct. 2384, 2391 (2014).

because Congress could amend the FDCPA to reflect the changing debt collection market if it so chooses. In light of potential new regulations, courts may be revisiting the definition of "debt collector" under the FDCPA in the near future.